



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF A-S- INC.

DATE: AUG. 16, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of information technology (IT) consulting services, seeks to employ the Beneficiary as a senior software programmer analyst. It requests his classification under the second-preference immigrant category as a member of the professions holding an advanced degree or its equivalent. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, “EB-2” category allows a U.S. business to sponsor a foreign national with a master’s degree, or a bachelor’s degree followed by five years of experience, for lawful permanent resident status.

The Acting Director of the Nebraska Service Center denied the petition. Interpreting the accompanying certification from the U.S. Department of Labor (DOL) to allow less than an advanced degree, the Director concluded that the labor certification does not support the requested classification.

On appeal, the Petitioner submits additional evidence and asserts that the Director misinterpreted the labor certification. The Petitioner contends that a master’s degree is the offered position’s minimum educational requirement.

Upon *de novo* review, we will withdraw the Director’s decision and remand the matter for the entry of a new decision consistent with the following analysis.

**I. EMPLOYMENT-BASED IMMIGRATION**

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first obtain DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, an employer must next submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a Beneficiary meets the DOL-

certified requirements of a position and regulatory requirements for a requested classification. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

## II. THE VALIDITY OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced-degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). For EB-2 classification, a labor certification "must demonstrate that the job requires a professional holding an advanced degree." *Id.*

The term "advanced degree" means:

any United States professional or academic degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressively responsible experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

To determine the minimum job requirements of an offered position, USCIS must examine the job-offer portion of an accompanying labor certification. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that the "DOL bears the authority for setting the *content* of the labor certification) (emphasis in original).

Here, the labor certification states the educational requirements of the offered position of senior software programmer analyst as a U.S. master's degree or a foreign equivalent degree in computer science, information systems, "software engineer[ing]," an IT field, "or equivalent." Also, part H.14 of the labor certification ("Specific skills or other requirements") states: "Equivalency means employer will accept foreign education by qualified evaluation agency on the basis of foreign education credential only."

The record establishes the Beneficiary's possession of a foreign degree equivalent to a U.S. master's degree in computer science and engineering. The Director, however, interpreted part H.14 of the labor certification to indicate the Petitioner's acceptance of less than an advanced degree as a minimum educational requirement for the offered position. The Director therefore concluded that the labor certification does not support the requested classification of advance degree professional.

On appeal, the Petitioner argues that part H.14 of the labor certification merely clarifies its acceptance of a foreign degree equivalency as determined by a reliable foreign credentials evaluation

service. The Petitioner states that, as indicated on the labor certification, it will not accept less than a master's degree for the offered position.

The plain language of part H.14 supports the Petitioner's statements. Part H.14 describes an acceptable foreign educational equivalency rather than the minimum educational requirements of the offered position. Consistent with regulations, Part H.14 states the Petitioner's acceptance of an evaluation "on the basis of [a] foreign education credential only." See 8 C.F.R. § 204.5(k)(2) (requiring an advanced degree professional, in lieu of a bachelor's degree followed by five years of experience, to have a single U.S. or foreign degree above that of baccalaureate). Part H.14 does not indicate the Petitioner's acceptance of less than a master's degree, nor of a master's equivalency based on combinations of lesser degrees or of education and employment experience.

Thus, contrary to the Director's finding, the plain language of the labor certification states an advanced degree as the minimum educational requirement of the offered position. We will therefore withdraw the Director's decision.

### III. ABILITY TO PAY THE PROFFERED WAGE

Although the Petitioner has overcome the denial ground, the record does not establish the petition's approvability. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).<sup>1</sup> Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of senior software programmer analyst as \$94,827 a year. As of the petition's filing and decision, required evidence of the Petitioner's ability to pay the proffered wage was not yet available for 2017, the year of the petition's priority date. The record therefore does not establish the Petitioner's ability to pay from the petition's priority date onward.

Also, USCIS records indicate the Petitioner's filing of other immigrant petitions that were pending or approved as of the petition's priority date, or were submitted thereafter. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other applicable petitions from June 21, 2017, until the beneficiaries obtained lawful permanent residence. See *Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay combined proffered wages of multiple petitions).<sup>2</sup>

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<sup>1</sup> This petition's priority date is June 21, 2017, the date the DOL accepted the accompanying labor certification application for processing. See 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

<sup>2</sup> The Petitioner need not demonstrate its ability to pay the proffered wages of other petitions that were denied,

Because additional evidence is required to determine the Petitioner's ability to pay the proffered wage, we will remand this matter. On remand, the Director should ask the Petitioner to submit copies of an annual report, federal income tax returns, or audited financial statements for 2017. The Petitioner must also provide the proffered wages and priority dates of its other petitions that were pending or approved after June 21, 2017, or were submitted thereafter.

The Petitioner may also submit additional evidence of its ability to pay, including evidence of: any wages it paid to other applicable beneficiaries in 2017; the denial, withdrawal, or revocation of any applicable petitions; any lawful permanent residence received by applicable beneficiaries; and in support of the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967). Upon receipt of a timely response from the Petitioner, the Director should review the entire record and enter a new decision.

#### IV. CONCLUSION

The accompanying labor certification demonstrates that the offered position requires an advanced degree professional. Additional evidence, however, is needed to establish the Petitioner's ability to pay the proffered wage.

**ORDER:** The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of A-S- Inc.*, ID# 1567098 (AAO Aug. 16, 2018)

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withdrawn, or revoked, without a pending appeal or motion.